Robbie, Gregory, Alex and Phillip Masterson, Copartners, d/b/a Masterson's Food and Drink *and* Donna Strong. Case 9-CA-16672

22 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 5 April 1982 Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held at Louisville, Kentucky, on February 23, 1982, on complaint of the General Counsel against Robbie, Gregory, Alex and Phillip Masterson, Copartners d/b/a Masterson's Food and Drink, herein called the Respondent or the Company. The complaint issued on May 20, 1981, upon a charge filed on April 10, 1981, by Donna Strong, an individual. The sole question to be decided is whether the Respondent discharged the Charging Party in violation of the statute. Briefs were filed by the General Counsel and the Respondent.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACTS

I. THE BUSINESS OF THE RESPONDENT

During the 12-month period preceding the hearing, the Employer received gross revenues in excess of $500,000 in the operation of its public restaurant and catering business in Louisville, Kentucky. During the same 12-month period the Respondent purchased lobsters valued at $9,800 which it received from out-of-state sources. It also received, during that same period, approximately $120,000 of revenues from American Express and $53,000 for services performed for Louisville Gas and Electric Company, a public utility company. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that International Brotherhood of Electrical Workers, Local 2100, affiliated with the International Brotherhood of Electrical Workers, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Case in Brief*

In its restaurant and banqueting business this Company not only serves meals to single and large groups of customers on its own premises, but also sends food by its employees to the premises of its customers for consumption there. This is called catering; i.e., a contract is made to feed so many people at designated times somewhere away from the Respondent's primary location. Also in the city of Louisville, there is the Louisville Gas and Electric Company, with a great number of employees in its principal facility.

In early March 1981 that company had a problem on its hands; the rank and file unionized, struck, and picketed the whole place. In order to provide food for those persons who did not strike—supervisors and white collar people, as indicated in the record, and, I suppose, also replacements and others who chose not to strike—the Gas Company contracted with the Respondent to do a sort of off-premise catering job, bring food for the nonstrikers just as it more often feeds wedding or Bar-Mitzvah guests in relatively congenial environments. When word got around among the Respondent's employees that food would have to be carried across the picket lines and fed to the nonstrikers, there developed an understandable reluctance among some of them. The catering agreement was in fact carried out on March 4, 5, and 6, with employees making the necessary deliveries across the picket line. Whether it continued thereafter is not clear, but I think it did go on for some time anyhow. How long does not really matter.

Late in the evening of March 6, at 11 or maybe 12 o'clock at night, Donna Strong, one of the approximately 45 servers—a useful synonym today for waitresses and waiters—was discharged. She was one of many employees, including others besides waitresses, who had given management to understand that, for reasons sufficient unto themselves, they would not cross the picket line in any work assignment should the Company schedule them to go into the Gas Company premises as part of their work duties. Strong had told the catering and banqueting manager, Sherry Reese Coleman, here called Coleman, at or about 3 o'clock that afternoon, what her feelings were on the matter. She was not scheduled to

work at the Gas Company that day, nor, indeed, was she ever scheduled to go there at all. A number of things happened after 3 p.m. on March 6 as Strong continued on the job straight through until late at night. There is no evidence that there was any further talk about the strike or about crossing the picket line, between Strong and any other member of management, after 3 p.m. that day. And when she was fired, although there was a lot of acrimonious talk, with voices raised and indignant arms waved in many directions, no reference was made by any of the actors to this business of working or refusing to work across the picket line.

The complaint alleges that when Coleman, the manager, decided to discharge Strong, her reason was because the waitress, at 3 o'clock, had voiced prounion sentiments, had aligned herself in concert with fellow employees—to use a statutory phrase—to stand side by side with the unioneers who were together striking the Gas Company, and never mind what Strong did between 3 and 11 o'clock that day, or anything else that happened after 3 p.m. Denying any illegal emotion in her now questioned action, Coleman, on behalf of the Respondent, says she fired the lady for having been unpardonably insubordinate and disrespectful to her that very moment. And Strong, if her testimony be appraised in total—rather than out of context as suggested by the General Counsel—virtually admitted not only two violations of work rules that same afternoon, but also a heated, loudmouthed quarrel with lower supervisor, Fridoon Shirooni, which provoked the final confrontation between Coleman and herself immediately preceding the midnight discharge.

No matter how I look at the case—failure of the General Counsel to prove a *prima facie* case, convincing affirmative evidence that the reason why she was fired was because of personal misbehavior toward supervisors, or a finding that regardless of Strong's views about crossing the picket line the Respondent would have fired her anyway (*Wright Line*, 251 NLRB 1083 (1980)), I must dismiss the complaint.

B. *The Evidence*

The principal witnesses were Strong, the waitress, Shirooni, the supervisor immediately above her that day, and Coleman, the higher manager who is over Shirooni, and a number of other middle supervisors. The critical testimony involves three conversations Strong had, two with Coleman and one with Shirooni. The substance of what each participant said to the other in each of these three talks is clear and not disputed, once the coloration in the witnesses' versions, plus their animated and emotional attitude in the retelling, is swept aside. At 3 o'clock Strong told Coleman she would not work across the Gas Company picket line and Coleman told her it was her duty to do that. At or about 11 o'clock Shirooni directed Strong to put her name to a written disciplinary report he had made to record, in her personnel file, rules violations she had committed that afternoon, and she refused to sign. Lastly, after 11 p.m., Coleman told her to come in to her office so she could talk to the waitress and set in order her dispute with Shirooni and her disobedient refusal to sign, and, again, Strong refused to come over to talk about the subject at all in any respect.

Since in each instance the subject of discourse, and the conflicting positions taken by the participants in the conversations, touched upon personal and emotional feelings—the employee, the inferior actor, feeling denigrated, the superior persons, the literal supervisors, resenting a lack of proper respect for their more important status—all three of them understandably used strong language in defense of their positions. Were voices raised? How loud was the yelling? Did one or the other display too much disrespect for the other's feeling of propriety? Did the waitress actually justify her sociological and philosophical views about the right to strike to Coleman? Did Coleman, late at night, really "poke her finger" too close to Strong's breast when calling her down for refusing an order to come into the office to receive a lecture on proper behavior toward her supervisors? Too close a look at the transcript of testimony creats the impression of a conflict in testimony, one witness giving the lie to another about what happened. But in truth there is no disagreement as to what happened, at least with respect to anything that is worth weighing in appraisal of the merits of the General Counsel's complaint. Where the testimonial stories of these three witnesses vary in substance at all, I credit the supervisors against Strong. Strong's marked exaggerations, her repetitive defensive and argumentative interjections, her repeated evasions of direct answers to questions, in short, her general demeanor at the hearing greatly impaired her credibility. Shorn of the descriptive and argumentative defense language used, to a degree, by all the waitresses at the hearing, the following is what happened.

When Strong finished her scheduled shift at or about 3 o'clock that day, she was asked could she work the next one also. She called home, arranged for a babysitter, and agreed to stay. In the talking between her and Coleman the question of working at the Gas Company arose. That much is clear. According to Strong, the manager said the strike had nothing to do with these employees, insisted "everybody in this Banquet Department is going to take part in the strike," "got very angry," and several times told her she was "quitting" by taking a contrary position. As Coleman recalled it, it was Strong who was upset and brought up the subject to start with; the manager did not deny saying a refusal would be the equivalent of quitting the job. Since it is undisputed Strong was not then, or ever, scheduled to work at the Gas Company, I think Coleman's testimony is the more reliable. She ended by saying the matter was "left . . . up in the air."

Of beginning pertinence is the fact the manager did not discharge Strong, as one would normally expect, if she had really become so incensed because of that one issue, as the complaint says. The phrase "left up in the air" best describes how the disagreement came to rest. What the manager meant was that, if the moment ever came when Strong was in fact assigned to work at the Gas Company catering contract, a refusal to perform her duties there would be the same as voluntarily abandoning her job. That point was never reached. Coleman did not discharge the waitress then and there, as she could

have done, and the subject was never mentioned between the two of them thereafter.

At or about 6 o'clock Strong was assigned to work at a dinner being served to a party of 500 people. Over her, in charge of the group, was Supervisor Shirooni. While Strong was in a food preparation room assisting someone else prepare salads, Shirooni entered and told her to stop doing that and to carry the salads into the dining room. She continued to make salads instead. Here we will start with the supervisor's version first. He said that the waitress' response to him was, "Why don't you fall in and do these, and I go ahead and take the salad?" He left the room for a few minutes to look after other things because, as he said at the hearing, maybe the lady was tired, or disturbed about something else. Within minutes he was back, saw Strong still standing there preparing salads, and again told her to carry the salads to the diners. Again Strong ignored him, but finally did as she was told. According to Strong, she ignored Shirooni's first order because, with not enough salads ready, she thought the preparation work was more pressing at the moment than carrying the salads out. Strong continued that, when Shirooni returned, he was "very angry and he started to scream at me," and, when she said there were not any salads made, Shirooni repeated his order. Her final response, still from her testimony, is that she then came back with: "Well, are you going to make salads now, then?" Finally, she did as she was told.

The last thing I intend to decide in this case is who was right and who was wrong in this supervisor finding fault with an underling. At one point Strong admitted there were "less than 20" salads already prepared when Shirooni first asked her to carry them out. She also said a carryout tray "normally" holds 8 to 10 salad plates. The supervisor could not have been entirely wrong. Did he start screaming, as Strong again colored her story? I do not know about that, but the fact remains he was the supervisor, he was the man who gave orders, and the waitress found herself in the position—sad to say, the lot of so many of us in this world—where she had no choice but to obey.

There is a fixed rule in this place that no employee while on duty or during any break period may sit in the drinking lounge, or bar area, especially when he or she is in uniform. At 11 o'clock that fatal night Strong asked her supervisor could she take a break, and was told she could take a half hour off. On her way somewhere else, she passed through the bar, saw two friends, employees then completely off duty, and sat down to talk with them at a table where they were drinking beer. It was an absolute violation of the rules and she knew it. In a very short time Coleman happened to pass by and look in. Again a bit of variance in the testimony. Strong said she asked the manager, "Is it okay if I just sit in here and talk to Ra'ol and Edwin Ogaldez" and that Coleman answered, "Sure. I don't see any reason why not." As Coleman related it, Strong asked "could she stay there for a minute and talk to them" and she said "yes." Strong then started drinking coffee at the table. "Half way through with my break"—this would be about 15 minutes later—Shirooni, her then immediate supervisor, looked in, saw her still sitting and chatting, and said nothing.

The following tidbit may be self-serving but must be accepted as true because it fits squarely into the rest of the tale. Shortly thereafter, while Coleman was having dinner with two other supervisors, Shirooni came over to her and related how Strong had refused to bring salads into the dining room when so ordered and then been seen taking her break in uniform in the drinking lounge. Coleman, believing, as she said at the hearing, that Shirooni had given permission in advance, asked had Shirooni given such permission. When Shirooni said no, the manager told him to write up a disciplinary report on Strong and have Supervisor Tomes witness it. It is an established system that there must always be two supervisors in attendance when such a disciplinary warning is issued.

We come to the next drama scene. Shirooni wrote the disciplinary report, in his own hand, called Strong to his office, handed it to her, and asked her to sign it. She refused. Her version is that she was unable to read his handwriting, and therefore just handed it back to him. First she testified that Shirooni "started to read the—the piece of paper to me. And it—I don't remember specifically what it said, but it was in regard to the salad incident, that he felt that I had been trying to tell him what to do, and that he had seen me in the bar drinking." Her answer at this point was "I can't sign that. That's not true. I don't drink." With the supervisor insisting that she sign, she came back with, still according to her testimony: "I don't know what kind of games you're trying to play . . . I've been here all day. I've worked hard, I'm tired, I've got to finish busing this room. I have to be back here at 8 o'clock in the morning, and I'm—then I'm going to leave." Strong made clear in her testimony that Shirooni accused her of drinking as he talked, not while reading the written report. The waitress, who does not drink, kept repeating that she said that to the supervisor several times. The written discipline was received in evidence; it is legible, and while detailing both the salad incident and the sitting in the bar, it says nothing about drinking.

The supervisor put it differently. He handed her the report, he told her to add any comment she thought proper, and to sign it. Her reaction, according to Shirooni, was: "I don't have the time to play your game," and she rolled it up and "she threw it at my face," and she walked away. Shirooni also added that he told Strong exactly what was written on the paper. He was corroborated by Pat Tomes, the other supervisor present when the flareup took place. From Tomes' testimony: "She said she couldn't read it, and Fridoon read it, explained it to her. She said she was not going to sign it, it was not true, and that she was tired, and didn't want to play these games. And she was—just had an arrogant attitude about it . . . . Her attitude was not good about it, and she tossed it at Fridoon . . . . Q. Would you please explain the word 'tossed'? A. To toss is to throw."

Again, I am convinced Shirooni's story is closer to the truth than that of the waitress. If the supervisor was really disposed to build a false record of wrongdoing, as

the complaint implies, he would have added the business about drinking in his report; he did not. Why should I believe he made that one up on the spur of the moment? I will not decide with precision whether she politely handed the report back or threw (tossed?) it in his face. All that counts is that at this point matters finally came to a head.

The last scene took place outside the door of the manager's office. Indignant at Strong's at least apparent disrespect toward his certainly more dignified level of authority, Shirooni paged his chief, Coleman, and complained of what had happened. With this the manager returned to her own office, together with other supervisors she had been with, saw Strong nearby, and called her into the office for a talk. The waitress' first answer was: "I want to get this room bused. It's late. I want to get out of here." When Coleman repeated her order, the response was, "Look, I don't have time for these games . . . . It's late, and I'm tired, and I want to get out of here." Now the manager repeated: "Donna, I want to see you in the banquet office right now." Strong's final reply was that "she was not going to talk to me, that she was just not going to talk to me."

While Strong's recital here is more dramatic, it does not differ in substance. If anything, it serves all the more to make the defense assertion—discharge for insubordination—all the more convincing. As Strong would have it, it was Coleman who accused her of playing games, who accused her of drinking in the bar, who insisted she sign the reprimand or else. "And she kept screaming, and she started to poke her finger at me and shove me against the wall. And the whole time, you know, I'm trying to tell her, 'Sherry, I don't drink. I wasn't drinking.' And her voice got louder and she got really angry and she said, 'You were, I saw you drinking,' and she kept poking at me . . . . I said, 'Maybe we need to get Greg or Alex. [two of the Masterson owners]. Maybe we need to talk to them.' And she said, 'You've already done enough talking.' She said, 'I know you went to Alex right after you left my office,' she said, 'And I'm going to have you know that I am your boss.' 'You're off the schedule from now on. Don't bother to come in tomorrow,' which I assumed meant that I was fired at that point."

It is at this point in her testimony that Strong's credibility, compared to that of the management witnesses, suffers the most. She undoubtedly was tired that night, after being on duty for 15 or 16 hours, and it is true that in most places of employment clashes of this kind between the lower echelon and people in authority happen all the time. But even allowing for a certain degree of irritation honestly related by her a year after the events, it is obvious to me that she was adding in flammatory frills to her story as oblique support for the basic thrust of the complaint.

Conclusion

As already stated, even ignoring all the facts supporting the affirmative defense, I do not see a *prima facie* case here. The manager quarreled with Strong over the principle of crossing a picket line, but she took no action against her then. Strong did not disobey an order, or disregard a work assignment for any such reason; she was not told to go to work at the Gas Company. Fearful after disagreeing with Coleman, she went to Masterson, one of the owners, right after 3 o'clock, and appealed to him for sympathetic understanding of her feelings. He was considerate and kind, made light of the matter, and even promised to talk to Coleman to ease any tension that might have developed. This was the top man talking, the real policymaker.

There were others, many, who openly expressed the same views as Strong told management that if asked they would not cross that picket line. Still more significant is the fact that Shirooni himself, who as a supervisor under the statute could be fired with impunity even for outright union activity, refused to work at the Gas Company. He said so flatly, although I do not know whether he in fact turned down a direct assignment. Probably not, because there is uncontradicted testimony that the work was all performed by volunteers. With there being sufficient volunteers, at least up to that day, there was no reason for Coleman to fire Strong during March 6. If animus to the point of discharge can be said to have existed at all, it existed when Strong expressed her view. Finally, it was Coleman personally who had just offered the waitress the opportunity to work a second full shift starting at that moment. She could have taken back her offer, but did not. What better proof that whatever the manager thought of people who like to honor a picket line, she did not deem it reason enough to fire anybody?

I shall dismiss the complaint in its entirety. This means, of course, also the second and quite distinct allegation that the Respondent committed a separate violation of Section 8(a)(1) of the Act. When talking to strong at 3 o'clock about the employees' duty on *this* job to cross *that picket line*, Coleman asked who else was thinking of refusing to work at the Gas Company if they should be requested to do so. The complaint calls this "coercive interrogation" concerning the "involvement of fellow employees in concerted activities for the purpose of mutual aid or protection." The manager was responsible for seeing that there were enough people available to perform the work for which they were paid; she had to know how many might volunteer. I take this theory of illegality to be a parallel between Coleman's question and an employer's question—precisely as appraised in the multiple Board decisions cited in the General Counsel's brief—"Who else signed union authorization cards? Who else went to the union meeting last night?" It would demean this decision to waste one sentence in response to such an argument. A case without substance does not gain strength with meaningless embellishments.

Absent a *prima facie* case, there is really no reason for discoursing at length about why Coleman discharged this one waitress. The General Counsel makes much of the fact that Strong was a very good employee; in fact there are several periodic evaluations much to her credit received in evidence. She got a number of successive raises. That very afternoon, when she went to talk to Masterson, the boss told her she was a desirable waitress. But what more than anything else completely kills this complaint is the further absolute truth that the supervi-

sors did not want to fire her at all. All Supervisor Shirooni wanted of her was that she sign the disciplinary notice like everybody else. He did not tell her to go home even after she discourteously refused. And when the manager wanted to lecture her for such improper behavior, it was only for the purpose of teaching her a lesson, not to get rid of her. This shows that the two rule violations she had committed during the day were not, in the opinion of management, in themselves reason for dismissal. This is not, therefore, the so-called pretext case.

And no matter how artfully the General Counsel's brief seeks to cover up the two delinquencies by the waitress that day, there they remain. It is one thing for a supervisor to give permission for disregarding a rule *before* the employee violates it, but it is something again to go soft and say okay *after* the offense is committed. Even then the supervisors were willing to forget about that. It was only when later Strong again flouted authority, and told Shirooni to make the salads himself if he did not like the way she choose to work, that it was decided to put her in her place. The final straw was the waitress' repeatedly expressed indifference to the voice of authority. I admire the General Counsel's skill in tempering the force of a gale down to the gentle breath of a breeze. Rather than cross swords with her on so delicate a subject, I will let a philosopher decide. "The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend when the wind blows across it." (*The Cunfucian Anaects*, book XII, 19.) It can veritably be said that Strong paid the final price because it was she who asked for it.

Now, I am not authorized, indeed I do not consider myself qualified, to sit in judgment upon Coleman's moral standards. She could have shown a little more tolerance of the frailties of others. After all, Strong was tired, after working two consecutive shifts. But then, the record indicates Coleman, too, had been on duty much longer than a normal workday. It was almost midnight. Perhaps the weaknesses of mankind—womankind?—simply showed up in what both Strong and Coleman did that day. These are but the vicissitudes of life.

RECOMMENDATION[1]

I hereby recommend that the complaint be, and it hereby is, dismissed.

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.